U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A70 006 067 - Harlingen

Date: AUG 16 1996

In re: JUAN CARLOS GARCIA

IN DEPORTATION PROCEEDINGS

INDEX

APPEAL

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ORAL ARGUMENT: December 1, 1994

CHARGE:

Order: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] - Entered without inspection

APPLICATION: Termination of proceedings

The respondent, through counsel, has timely appealed from an Immigration Judge's oral decision, dated March 18, 1994, finding the respondent deportable under section 241(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(1)(B); and granting him voluntary departure under section 244(e)(1) of the Act, 8 U.S.C. § 1254(e)(1). The respondent challenges the Immigration Judge's finding of deportability and accordingly requests termination of deportation proceedings against him. Oral argument was heard by this Board on December 1, 1994. See 8 C.F.R. § 3.1(e) (1994). The appeal will be dismissed.

I. ISSUES PRESENTED

This case, which concerns a minor respondent's appeal, presents the following issues:

(1) Whether this Board "inexplicably departed from established precedent" in our prior order in this matter, dated August 17, 1993, remanding the case for further proceedings rather than terminating deportation proceedings;

(2) Whether the Immigration and Naturalization Service did not properly serve the Order to Show Cause (Form I-221) upon the then 13-year-old respondent pursuant to the special regulatory provisions at 8 C.F.R. §§ 242.3(a) and 103.5a(c)(2)(ii), governing service of minors under 14 years of age;

(3) Whether the alleged admissions of the respondent contained in the Service's Form I-213 (Record of Deportable Alien) are involuntary and, therefore, inadmissible as evidence of his alienage and deportability;

(4) Whether the Service failed to meet its burden of proving the respondent's alienage and deportability by "clear, unequivocal, and convincing" evidence; and

(5) Whether the Service violated its own regulations and, if so, whether material prejudice to the respondent resulted such that these deportation proceedings should be terminated for want of due process.

We answer each of these questions in the negative.

II. FACTS AND PROCEDURAL HISTORY

This case was before us on a prior occasion. In our decision, dated August 17, 1993, we remanded the record to the Immigration Judge for further proceedings and the entry of a new decision on the respondent's deportability. At the conclusion of new proceedings, the Immigration Judge duly rendered a new decision from which the respondent now appeals. The following is a synopsis of the proceedings leading to this appeal.

A. Proceedings From August 10, 1992, to April 22, 1993

The Immigration and Naturalization Service instituted proceedings in this case by issuance of a superseding Order to Show Cause (Form I-221) (OSC) on August 10, 1992. In the OSC, the Service charges the respondent with deportability under section 241(a)(1)(B) of the Act, as an alien who entered the United States without inspection. The Service specifically alleges that the respondent is a native and citizen of Honduras who entered the United States without inspection at or near Laredo, Texas, on or about June 10, 1992.

The respondent appeared pro se at a group deportation hearing on September 1, 1992. He indicated at that time that he was 13 years old. An Immigration Judge thereupon granted the respondent a continuance to afford the respondent an opportunity to secure counsel. The respondent appeared with counsel at a subsequent hearing on October 6, 1992. During the course of the hearing, the Service called the respondent as its first and only witness. The respondent, however, invoked his Fifth Amendment privilege against self-incrimination and declined to answer the Service attorney's questions.

The Service then offered as evidence of the respondent's deportability a Record of Deportable Alien (Form I-213), which had been prepared by one of the Service's Border Patrol Agents who had arrested the respondent on June 20, 1992. Over the objection of the respondent, the Immigration

Judge accepted the I-213 into evidence. The Immigration Judge further found that the Service's I-213 was sufficient evidence to establish the respondent's alienage and deportability as charged in the Order to Show Cause. The proceedings were then continued to provide the respondent with an opportunity to apply for relief from deportation.

On October 16, 1992, the respondent filed a motion with the Immigration Judge requesting that he reconsider his finding of deportability. In support of the motion, the respondent submitted an affidavit in which he stated that he had been interrogated by the same Service officers who arrested him, that he was not accompanied by an adult or anyone else during the 30-minute interrogation, and that he was 13 years old on the date of his arrest and interrogation. The respondent subsequently supplemented the motion with an affidavit from a licensed psychologist who had interviewed the respondent. The psychologist opined that the respondent appeared to have normal intelligence. The psychologist further advised that during the course of the interview with the respondent, he "tended to nod, smile, and respond affirmatively . . . even when he did not understand the inquiry."

At a subsequent deportation hearing on or about November 24, 1992, the respondent requested that his motion to reconsider the finding of deportability be adjudicated. The respondent also indicated that he did not wish to apply for asylum, although he would be seeking voluntary departure in lieu of deportation. The Service indicated that it would not oppose the respondent's request for voluntary departure.

In his decision finding the respondent to be deportable as charged, the Immigration Judge found that the contents of the Service's I-213 were adequate to establish the respondent's alienage.[1] He noted that the respondent did not produce any evidence to challenge the information in the I-213 which reflected that the respondent is a native and citizen of Honduras. He accordingly concluded that the burden shifted to the respondent to prove the time, place, and manner of his entry into the United States and that the respondent had not met this burden.

B. Board's August 17, 1993, Decision

Although the respondent raised a number of procedural issues in his initial appeal, we found it unnecessary to address such issues because we concluded that the authenticated I-213 alone, although enough to meet the Service's burden of proof in most cases, was insufficient to establish the minor respondent's alienage by clear, unequivocal, and convincing evidence. We observed, "Where the Service seeks to establish alienage based on alleged admissions made during the interrogation of an unaccompanied minor, the Service should present evidence from the arresting officers in order to

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1/ The Immigration Judge who had found the respondent to be deportable as charged at the October 1992 hearing retired prior to his entry of a decision in this case. Accordingly, another Immigration Judge familiarized himself with the record of proceedings pursuant to 8 C.F.R. § 242.8(b), and on April 22, 1993, entered a decision in the case.

demonstrate that the interview was conducted in a non-coercive environment and that the respondent was competent to respond to the questions posed to him." Matter of Juan Carlos Garcia, A70 006 067, slip op. at 5 (BIA Aug. 17, 1993).

Our holding was based in large part on the questionable reliability of a minor's admissions and the fact that the I-213 was introduced without corroborating testimony by the form's preparer as to the particular nature and circumstances of the respondent's arrest and interrogation. We also noted in support of our holding the special treatment accorded minors throughout the regulations governing deportation proceedings. We, accordingly, remanded the record for further proceedings to allow the Service an opportunity to present the testimony of the arresting and examining officers.

C. Proceedings on Remand

In a ruling issued on November 19, 1993, the Immigration Judge concluded that the Service properly served the OSC upon the respondent in a manner consistent with 8 C.F.R. §§ 242.3(a) and 103.5a(c)(2)(ii). Accordingly, the Immigration Judge accepted the respondent's pleadings denying the allegations contained in the OSC and set a hearing on the issue of the respondent's deportability. At the continued hearing on March 18, 1994, the Immigration Judge initially denied the respondent's motions for termination of proceedings and a separate hearing on the issue of the admissibility of the Service's evidence against him.

1. Testimony of Agents Gibson and Chavez

The Service then presented testimony of the arresting and examining officers, Border Patrol Agents Richard Gibson and Thomas Chavez, from the Laredo North Border Patrol Station. The agents testified to the following facts.

Agent Gibson stated that he and Agent Chavez were on patrol on the morning of June 20, 1992, a Saturday, when they received a call from the dispatcher relating that a resident of Laredo had called the Service to notify them that someone in her residence might be an undocumented alien. The agents then drove to the informant's home in a border patrol van. Both agents were dressed in full uniform, including badge and service revolver. Both speak Spanish fluently.

When the two agents reached the informant's home, the informant was there waiting for the agents. Only Agent Gibson went to meet the informant and the respondent. Agent Chavez remained in the van. The informant pointed out the respondent to Agent Gibson. According to Agent Gibson, the informant stated that the respondent had been with her for approximately 10 days. When Agent Gibson approached the respondent, the respondent did not attempt to run or hide. Responding to Agent Gibson's inquiries, the respondent stated that he was not a United States citizen and that he did not have any documents to show that he was lawfully in the United States.

Agent Gibson then escorted the respondent to the border patrol van. After the respondent said good-bye to the informant and the informant gave the respondent a bag of oranges and clothing, the respondent climbed into the rear of the van, which is separated from the front seats by a cage. There was no physical contact between Agent Gibson and the respondent during this episode, and the

respondent was not restrained while inside the van. According to Agent Chavez, the respondent was not searched or frisked because he did not appear to pose a threat to the agents.

Prior to departing for the station house, Agent Chavez asked the respondent, "Where are you from?" The respondent replied that he was from Honduras. Agent Chavez then asked the respondent whether he had relatives in the United States. The respondent stated that he did not. The respondent added that his brother had been arrested in Mexico City by Mexican immigration authorities and that, as a result, the respondent had traveled to the border alone and entered the United States without inspection with a group of several other aliens. According to Agent Chavez, the respondent did not appear to be upset while in the van.

The agents estimated that they reached the station house at approximately 12 noon, following a 10-minute drive from the informant's home. The agents escorted the respondent, again unrestrained, into the station's processing room. The processing room is an open room containing several typewriters, desks, and filing cabinets. The respondent was seated, offered a soda, and informed that he could eat his fruit if he wished. According to the agents, no other officers or personnel were in the station house at that time except their supervisor. The agents testified that it was routine policy at the station for the arresting officers also to process and examine the alien when no other officer is available.

Agent Chavez, the principal examiner, inquired as to why the respondent entered the United States. According to the agent's testimony, the respondent stated that he came to the United States to seek medical treatment for his eye and planned to go to a church in search of help. Agent Chavez testified that the respondent did not appear to be in need of immediate medical attention. Agent Chavez then proceeded with the examination of the respondent and recorded the respondent's statements on the I-213.

Agent Gibson testified that Agent Chavez conducted the examination of the respondent because there were no other agents available that day. Agent Chavez stated that the only person at the station house that day was his supervisor, who was making arrangements for the respondent's custodial placement at the time of the respondent's interrogation and that the policy of the office is to have the arresting officer examine the apprehended alien only when no other officer is available.

Agent Chavez testified that he advised the respondent of his rights prior to filling out the I-213. He stated that he provided the respondent at this time the following forms: I-214 (Warning as to Rights in an Administrative Proceeding -- Interview Log); I-274 (Notice and Request for Disposition); I-770 (Notice of Rights and Request for Disposition) (advisal of rights for unaccompanied minor aliens under 18 years of age); and I-618 (List of Legal Services Organizations in Vicinity) (Exhs. 2-6). Agent Chavez testified that he allowed the respondent an opportunity to read each of these forms before relating their contents to the respondent in Spanish. Each of these documents is translated into Spanish and bears the respondent's signature.

According to Agent Gibson, the respondent informed the agents that he entered the United States at Laredo, Texas, "by wading across the river" and that he was not inspected at that time by an immigration officer (Tr. at 69-70). Agent Gibson stated that he concluded at that point that the respondent was deportable as alien who had entered the United States without inspection. Agent

Chavez added that the information contained in the I-213 was obtained directly from the respondent's responses to questions that Agent Chavez asked in a "simple manner" (Tr. at 107-15).

2. Respondent's Testimony

When the Service attorney called the respondent to testify, the respondent stated his full name for the record, indicated that he was born on November 5, 1978, and stated that he was 15 years old. He thereafter invoked his Fifth Amendment privilege against self-incrimination and declined to answer questions regarding his place of birth, immigration status, or contact with Agents Gibson and Chavez. The Immigration Judge had previously granted the respondent's motion that his attorney be permitted to invoke his privilege on his behalf.

D. Contents of the I-213

The I-213 before us contains, inter alia, recollections of Agent Chavez, which are based upon alleged statements made by the respondent during interrogation. Agent Chavez's narrative reads as follows:

> Subject is a native and citizen of Honduras by virtue of birth. Subject last entered the United States by wading the river in order to avoid inspection by U.S. Immigration Officers. Subject is amenable to deportation under Section 241(a)(1)(B) of the INA, for having entered the U.S. without inspection. Subject makes no claim to U.S. citizenship or legal residency in this country.
>
> Subject was taken into custody by Border Patrol Agents, after the owner of a residence located in West Laredo called KAK 940. Subject was transported to the North Laredo Border Patrol Station for processing. Subject was advised of his rights and interviewed. The interview revealed that subject was a minor. The interview further revealed that subject entered the U.S. by himself without any adult relatives. Subject stated that his brother[,] who is 27 yrs. old and also from Honduras[,] was arrested by Mexican Immigration near Mexico City. Subject apparently traveled alone from Mexico City to Nuevo Laredo, TAMPS., Mexico. Subject further stated that he crossed with several other aliens from Mexico and that he came to the U.S. so that he could get medical treatment for his left eye. Alien also stated that he has a brother living in North Carolina. Subject, however, did not know the address of his brother.
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> Besides the brother living in North Carolina, Subject does not have any other relatives in the United States. Subject was processed and placed at the IES Shelter located at Los Fresnos, Texas[,] as per SBPA A. Hinojosa.

The respondent signed the form at the end of this narrative. Underneath the respondent's signature line is the following typed, untranslated statement in Spanish: "Yo no tengo un abogado en mi caso de immigracion." Translated, this statement reads, "I do not have a lawyer in my immigration case."

The I-213 also contains general background information concerning the respondent's identity and alleged date and manner of entry. The form indicates that the respondent is a citizen of Honduras who entered the United States without inspection near Laredo, Texas, on June 10, 1992. The form also provides the respondent's mother's name and his alleged address in Honduras. The form is certified by an "authorized certifying designee of the district director" for the Service. The respondent did not object to the manner of certification.

E. Immigration Judge's March 18, 1994, Decision

In an oral decision issued on March 18, 1994, the Immigration Judge concluded upon evaluation of the evidence of record that the Service had met its burden of adducing clear, unequivocal, and convincing evidence of the respondent's alienage and deportability under section 241(a)(1)(B) of the Act. The Immigration Judge found that the respondent "was in no way coerced" (I.J. at 6). He noted that the agents treated the respondent in a "kind manner" and that the psychological evaluation the respondent offered into evidence advises that the respondent "expressed very positive feelings towards immigration personnel, who provided him with food, companionship, guidance, approval, and emotional warmth" (Id.; Exh. 7). According to the Immigration Judge, the psychological evaluation supported the agents' testimony that they treated the respondent with the due care the respondent's age warranted.

The Immigration Judge determined that both of the agents were credible witnesses who presented "forthright, specific, plausible, and essentially consistent" testimony that is corroborated by the documentary evidence of record (I.J. at 9). He further emphasized that the questions asked of the respondent were simple, open-ended, and non-leading and that the respondent had not challenged the accuracy of the information contained in the I-213. Finding the I-213 information both reliable and accurate, the Immigration Judge concluded that the respondent's alienage and deportability had been established by clear, unequivocal, and convincing evidence. He thereupon granted the respondent's application for voluntary departure. The respondent has timely appealed from that decision.

III. PROPRIETY OF OUR AUGUST 17, 1993, ORDER REMANDING THE RECORD FOR FURTHER PROCEEDINGS

The respondent argues that our prior order in this matter was improper inasmuch as we remanded the case for further proceedings, rather than terminate deportation proceedings altogether. According to the respondent, in two similar cases in the past, one published and one unpublished, the Board terminated proceedings upon finding that the Service had not met its burden of establishing deportability by clear, unequivocal, and convincing evidence: Matter of Garcia, 17 I&N Dec. 319 (BIA 1980), and Matter of Hernandez-Jimenez, A29 988 097 (BIA Nov. 8, 1991). The respondent contends that we "inexplicably depart[ed] from established precedent and unpublished decisions in which the [Board] terminated proceedings upon the failure of the [Service] to establish alienage." We, however, find that our decision to remand in this case rather than terminate proceedings was a proper one.

As for "established precedent" holding that we must terminate proceedings in any case in which we find that the Service has not met its burden of establishing alienage by the requisite quantum of proof, regardless of the particular circumstances of the individual matter, we find none. Nor do the

cases cited by the respondent provide such binding authority. In both Matter of Garcia, supra, and Matter of Hernandez-Jimenez, supra, we indeed concluded that the Service had not sustained its burden of proving alienage and terminated proceedings. We, however, did not hold in either case that we must terminate in every such case. Moreover, as the respondent concedes, Matter of Hernandez-Jimenez, supra, is an unpublished order of no precedential value. See 8 C.F.R. § 3.1(g) (1995); Matter of Medrano, 20 I&N Dec. 216, 220 (BIA 1990; 1991).

Frequently there are cases before us where termination of proceedings would be inappropriate or unfair without allowing for further proceedings below. See, e.g., Matter of Grijalva, Interim Decision 3246, at 17 (BIA 1995) (finding that under particular circumstances of the case, "including the absence of implementing regulations or precedent regarding the . . . issues raised," Board remanded record for further proceedings and development of record). This is such a case. We are dealing here with novel and complex legal issues and factual questions concerning the process due unaccompanied minors in deportation proceedings. Our prior holding in this matter dealt with these same controversial issues. We believe, therefore, that, in the interests of fairness to the parties, it was "appropriate and necessary" to remand the case to the Immigration Judge for further proceedings consistent with our holding. See 8 C.F.R. §§ 3.1(d)(1), (2) ("The Board may return a case to the Service or Immigration Judge for such further action as may be appropriate, without entering a final decision on the merits of the case.").

Moreover, the respondent fails to address the fact that when this matter was last before us, the respondent argued that deportation proceedings should be terminated or, in the alternative, that the case be remanded to the Immigration Judge for further proceedings. Accordingly, we reject the respondent's contention that we were without discretionary authority to remand and were somehow bound to terminate proceedings.

IV. PROPRIETY OF SERVICE OF THE ORDER TO SHOW CAUSE UPON THE MINOR RESPONDENT

The regulations provide for specific procedures for service of an OSC on an incompetent or a minor under the age of 14:

> In case of mental incompetency, whether or not confined in an institution, and in the case of a minor under 14 years of age, service shall be made upon the person with whom the incompetent or the minor resides; whenever possible, service shall also be made on the near relative, guardian, committee, or friend.

8 C.F.R. § 103.5a(c)(2)(ii) (emphasis added); see also 8 C.F.R. § 242.3(a). This regulation ensures that the Service apprise "the person with whom the incompetent or the minor resides" of the charges and allegations against the incompetent or minor respondent in order to secure the respondent's presence at the appropriate hearing.

The record reflects that the Service personally served the OSC upon Ms. Paula Vargas, a foster parent under contract with the International Educational Services, Inc. (IES) shelter facility in Los Fresnos, Texas, where the respondent originally had been detained by the Service (Exhs. 1, 1A). IES, in turn, is under contract with the Service to provide care and custody of juveniles who are placed

in deportation proceedings. Apparently, the respondent was temporarily residing with Ms. Vargas at her home in Combes, Texas, at the time the OSC was served. The OSC bears Ms. Vargas' signature and a notation beside Ms. Vargas' signature on the OSC to the effect that she was the respondent's "foster parent" (Id.).

The respondent contends that Ms. Vargas, a foster parent under contract with IES and effectively an agent of the Service, did not "reside with" him. According to the respondent, he was still in the physical custody of the Service at the time the OSC was served and that "in the custody of" cannot be equated with "resides with" for purposes of the regulation. Having considered the respondent's arguments, we find that Ms. Vargas was "the person with whom the [respondent] reside[d]" at the time the OSC was served upon her under 8 C.F.R. § 103.5a(c)(2)(ii).

Section 101(a)(33) of the Act, 8 U.S.C. § 1101(a)(33) defines the term "residence" as "the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent." The respondent concedes that his address was that of Ms. Vargas at the time the OSC was served upon Ms. Vargas. We find that the respondent's residence with Ms. Vargas, although the result and condition of custodial placement by the Service, is nonetheless the respondent's "principal dwelling place in fact." Section 101(a)(33) of the Act.

We note that the phrase, "with whom the . . . minor resides," reasonably contemplates that service be made upon such persons as a foster parent or a director of a foster or shelter care facility or juvenile detention facility authorized to accommodate minors or juveniles by the laws of the state or locality. The fact that the regulation mandates service on such a person, but only directs service on a minor's near relative or guardian "whenever possible," indicates that the principal purpose of this provision is to provide service of the OSC upon the person in the best position to assure the minor's presence at the proceeding before the Immigration Judge.

Moreover, in our view this regulatory provision necessarily encompasses custodial placement by the Service. Otherwise, under the respondent's interpretation of the regulation, if an unaccompanied minor alien under 14 years of age is detained by the Service and then placed in a juvenile detention, foster care, or shelter care facility under contract with the Service, the minor may well be immune from service of an OSC until he reaches the age of 14. This interpretation not only undermines the plain meaning and purpose behind the applicable provisions of the Act and regulations, but would also do injustice both to minor aliens under 14 years of age, who would be relegated to "immigration limbo" in foster care or juvenile detention facilities for months or years without a determination of their immigration status, see section 242(a)(1) of the Act, 8 U.S.C. § 1252(a)(1) (deportation proceedings must be concluded with "reasonable dispatch" to avoid habeas corpus); and to the Service, which would incur great expense to provide adequate care for the minors during that period, cf. Reno v. Flores, 507 U.S. 292, 113 S. Ct. 1439, 1452-53 (1993).[2] Accordingly, we affirm the

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2/ To the extent that the respondent is challenging the constitutionality of 8 C.F.R. §§ 242.3(a) and 103.5a(c)(2)(ii), we note that this Board has long held that we are not empowered to find unconstitutional a statute or regulation we administer. See Matter of Hernandez-Puente, 20 I&N Dec. 335, 339 (BIA 1991); Matter of Valdovinos, 18 I&N Dec. 343, 345 (BIA 1982). "The Board and Immigration Judges only have such authority as is created and delegated by the Attorney General" and

Immigration Judge's holding that service of the OSC upon the respondent was properly effected and meaningful notice was afforded.

V. PROOF OF ALIENAGE AND DEPORTABILITY

As we find that this matter is properly before us, we turn to the issue of whether the Service established the respondent's alienage and deportability by "clear, unequivocal, and convincing evidence." See Woodby v. INS, 385 U.S. 276 (1966); 8 C.F.R. § 242.14(a). In establishing its case, the Service initially relied solely on the I-213 (Record of Deportable Alien), prepared on the date of the respondent's apprehension, containing a recollection of alleged statements by the then 13 year-old respondent admitting his foreign birth and entry into the United States without inspection. In our prior unpublished order sustaining the respondent's initial appeal, we held that given the respondent's status as an unaccompanied minor, the I-213 alone, without corroborating testimony by the officers who arrested the respondent and prepared the form, was insufficient to demonstrate the respondent's alienage. At the hearing below, the Service provided such corroborative testimony, and the Immigration Judge concluded that the Service had met its burden.

The respondent and amici advance several arguments contending that the Service's burden of proof has not been met in this case. Chief among them is the contention that custodial interrogation of an unaccompanied minor under the age of 16 is per se coercive and, therefore, any statements elicited from the respondent during the June 20, 1992, interrogation are inadmissible as evidence of his alienage and deportability. In the alternative, the respondent argues that this Board should hold that, as a matter of law, the statements or admissions of a child under the age of 16 are presumptively untrustworthy and that, in accordance with our prior holding in this case, the Service must bear the burden of establishing the child's "competency" under the "totality of the circumstances."

We will first determine whether the evidence at issue, an authenticated I-213 form containing out-of-court, hearsay admissions of the respondent, is admissible for consideration by the Immigration Judge as evidence of the respondent's alienage and deportability. We will then proceed to the determination as to whether the government document is accurate and reliable, and, therefore, sufficient to establish the respondent's alienage and deportability by the requisite quantum of proof.

A. Admissibility of Evidence in Deportation Proceedings Generally

Few principles are more deeply etched in the body of immigration law than that which provides that the Fifth Amendment entitles aliens to due process of law in deportation proceedings. Reno v. Flores, supra, at 1449 (citing The Japanese Immigrant Case, 189 U.S. 86, 100-101 (1903)); Ogbemudia v. INS, 988 F.2d 595, 598 (5th Cir. 1993); Matter of G-, 20 I&N Dec. 764, 780 (BIA 1993). Immigration Judges and this Board, therefore, must ensure that such proceedings comport with the basic notions of fundamental fairness.

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are "bound to uphold agency regulations." Matter of Ponce De Leon, Interim Decision 3261, at 7-8 (BIA 1996).

It is equally axiomatic, however, that the Immigration Courts and this Board, as administrative tribunals, are not bound by the strict rules of evidence applicable in the courts, except those rules provided in governing statutes and regulations. See Bustos-Torres v. INS, 898 F.2d 1053, 1055 (5th Cir. 1990); Trias-Hernandez v. INS, 528 F.2d 366, 368 (9th Cir. 1975); Matter of Barcenas, 19 I&N Dec. 609, 611 (BIA 1988). Accordingly, all evidence, including hearsay statements and other out-of-court declarations, is admissible in deportation proceedings as long as the evidence is probative, i.e. relevant, and its use is fundamentally fair. Bustos-Torres v. INS, supra, at 1055-56; Matter of Barcenas, supra; Matter of Toro, 17 I&N Dec. 340, 343 (BIA 1980).

B. Admissibility of Custodial Statements of the Respondent as Recorded in the Form I-213

The evidence contested in this case is the Service agents' testimony and an I-213 prepared by the agents and signed by the respondent, as well as Agent Chavez, on June 20, 1992 (App. I). The I-213 is essentially a recorded recollection of a Service agent's conversation with an alien. Bustos-Torres v. INS, supra. It is a form that is routinely completed after interviewing aliens suspected of having committed a deportable offense under section 241 of the Act, 8 U.S.C. § 1251. Felzcerek v. INS, 75 F.3d 112 (2d Cir. 1996); Espinoza v. INS, 45 F.3d 308, 309-11 (9th Cir. 1995). At issue before us whether the I-213, as evidence of the respondent's alienage and deportability, is relevant and its use is fundamentally fair.

1. Relevancy

Understandably, the respondent has not challenged the probative value of the I-213, for the form is clearly relevant to the issues of the respondent's alienage and deportability inasmuch as it tends to prove alleged facts at issue.[3] See Espinoza v. INS, supra; Bustos-Torres v. INS, supra. We proceed, therefore, to the issue of whether the I-213 should be excluded from consideration because its use would violate the "fundamental fairness" of the proceedings.

2. Fundamental Fairness of Use of the I-213

Generally, the fundamental fairness of the admission into evidence of an alien's in-custody statements for consideration by an Immigration Judge in a civil deportation proceeding is judged solely by whether the statements were 'voluntary' within the meaning of the Due Process Clause.[4]

3/ A finding as to the relevancy of a contested document should be made without regard to the document's accuracy or reliability, as these latter considerations go to the document's sufficiency, rather than its admissibility. See, e.g., Ballou v. Henri Studios, Inc., 656 F.2d 1147 (5th Cir. 1981).

4/ This Board has also recognized that a violation of due process may also result where "the manner of seizing evidence is so egregious that to rely on it would offend . . . fundamental fairness," irrespective of whether such evidence contains voluntary statements or admissions of the respondent. Matter of Toro,

See Bustos-Torres v. INS, supra; Young v. United States Dep't of Justice, INS, 759 F.2d 450, 454-55 (5th Cir. 1985); Navia-Duran v. INS, 568 F.2d 803, 808-11 (1st Cir. 1977); Bong Youn Choy v. Barber, 279 F.2d 642, 646-47 (9th Cir. 1960); Matter of Barcenas, supra; cf. Colorado v. Connelly, 479 U.S. 157, 163-67 (1986) (criminal proceedings); Fare v. Michael C., 442 U.S. 707, 724-27 (1979) (juvenile proceedings); In Re Sanborn, 545 A.2d 726, 730-33 (N.H. 1988) (Souter, J.) (involuntary civil commitment proceedings). "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false." Lisenba v. California, 314 U.S. 219, 236 (1941); see also Colorado v. Connelly, supra, at 167 ("A statement . . . might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum and not by the Due Process Clause.").

a. Voluntariness Inquiry Generally

In deportation proceedings, the alien bears the burden of initially coming forth with prima facie evidence that his statements were involuntarily furnished "before the Service will be called on to assume the burden of justifying the manner in which it obtained the[m]" and establishing the statements' voluntariness. Matter of Burgos, 15 I&N Dec. 278, 279 (BIA 1975) (quoted in Matter of Barcenas, supra, at 611); see also Espinoza v. INS, supra, at 310 ("The burden of establishing a basis for exclusion of evidence from a government record falls on the opponent of the evidence, who must come forward with enough negative factors to persuade the court not to admit it.").

The evidentiary use of an alien's in-custody statements in deportation proceedings is governed by standards of voluntariness akin to those applied in criminal cases. See, e.g., Navia-Duran v. INS, supra, at 808; De Souza v. Barber, 263 F.2d 470, 475-77 (9th Cir.), cert. denied, 359 U.S. 989 (1959); cf. Fare v. Michael C., supra (juvenile proceedings); In Re Sanborn, supra (involuntary civil commitment proceedings). The essential test of the voluntariness inquiry is whether, considering the totality of circumstances, the government obtained the alien's admission by physical or psychological coercion, intimidation, duress, or improper inducement, such that the alien's will was overborne. Colorado v. Connelly, supra; United States v. Rojas-Martinez, 968 F.2d 415, 417-19 (5th Cir. 1992); United States v. Raymer, 876 F.2d 383, 386-87 (5th Cir.), cert. denied, 493 U.S. 870 (1989).

Official overreaching is not limited to physical abuse, threats, duress, or intimidation; it may also include more subtle forms of psychological coercion or improper inducement such as false promises. See Colorado v. Connelly, supra; United States v. Raymer, supra; Matter of Garcia, supra. It may also include intentional exploitation of a known weakness of the subject of the interrogation, such as mental illness, exceptionally low intelligence, or impaired cognitive or volitional ability due to the

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17 I&N Dec. 340, 343-44 (BIA 1980) (cited in INS v. Mendoza-Lopez, 468 U.S. 1032, 1049-50 (1984)). The respondent does not allege any "egregious conduct" on the part of the Service in this case.

influence of drugs or alcohol, in order to extract admissions against interest.[5] E.g., United States v. Raymer, supra.

Proof of official coercive tactics or overreaching is "a necessary predicate to the finding that a [statement or admission] is not 'voluntary' within the meaning of the Due Process Clause." Colorado v. Connelly, supra, at 167. Once a showing of official overreaching has been made, we must proceed to a determination of whether, in view of the totality of the circumstances, such improper tactics were a crucial motivating factor behind the alien's decision to make admissions, such that his will, in fact, was overborne. See Withrow v. Williams, ___ U.S. ___, 113 S. Ct. 1745, 1751-54 (1993); Colorado v. Connelly, supra; United States v. Rojas-Martinez, supra; Hawkins v. Lynaugh, 844 F.2d 1132, 1140 (5th Cir.), cert. denied, 488 U.S. 900 (1988).

An alien's personal characteristics, such as his mental and physical condition, age, education, maturity, and experience, properly figure into the voluntariness calculus. See, e.g., Reck v. Pate, 367 U.S. 433, 440-42 (1961) (19-year-old mentally retarded youth subjected to inordinately lengthy and relentless interrogation, without presence of counsel, family, or friend); Northern Mariana Is. v. Mendiola, 976 F.2d 475, 485-86 (9th Cir. 1993) (police engaged in subtle forms of psychological coercion to extract confession of mentally retarded and illiterate defendant). Other relevant considerations include the duration of an interrogation, its location, its conditions, and its continuity, as well as the conditions preceding the interrogation, including the apprehension and transportation of the alien. See, e.g., Navia-Duran v. INS, supra (impermissibly long and abusive interrogation by Service officials following arrest of alien at her home in the middle of the night); Bong Youn Choy v. Barber, supra (Service officials extracted admissions of alien through use of intimidation, threats of imminent deportation or prosecution for perjury, and abusive interrogation tactics); Matter of Garcia, supra (Service agents repeatedly rebuffed alien's request to speak with his attorney and extracted admissions only after significant period of custody).

In deciding whether the coercive or deceitful tactics employed by the government were a crucial motivating factor behind an alien's admissions, we recognize that such tactics may more effectively prey on the less developed reason of a child than on the mind of a mature, experienced adult.[6] See, e.g., Gallegos v. Colorado, 370 U.S. 49, 52-55 (1962) (14-year-old boy held incommunicado for 5 days without access to counsel, friend, or relative). The younger the child, the more effective such

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5/ We are unpersuaded by the respondent's suggestion that any violation by the Service of its own regulations, regardless of whether the violation constituted a coercive tactic employed to elicit statements from a respondent, constitutes overreaching. While a violation of a regulation may be probative on the issue of the presence or absence of official overreaching, see, e.g., Navia-Duran v. INS, supra; Matter of Garcia-Flores, 17 I&N Dec. 325, 327 (BIA 1980), it is not inherently determinative.

6/ We have previously held that a separate hearing on the admissibility of such evidence as the I-213 is not required in civil deportation proceedings. Matter of Velasquez, 19 I&N Dec. 377, 380 (BIA 1986); Matter of Benitez, 19 I&N Dec. 173, 175 (BIA 1984). We find no cause to fashion an exception to our prior rulings for minor respondents.

tactics will likely be. See Haley v. Ohio, 332 U.S. 596, 599-600 (1948) (plurality opinion) ("[W]hen, as here, a mere child -- an easy victim of the law -- is before us, special care in scrutinizing the record must be used.").

b. Voluntariness of the Respondent's Admissions in the I-213

At the outset of our voluntariness inquiry, we ordinarily must first determine whether the alien has presented prima facie evidence of coercive activity or overreaching on the part of the government in obtaining the alien's statements and recording them on the I-213 or other similar document. See, e.g., Matter of Barcenas, supra. In the absence of such evidence, the statements will not be found to be involuntary and their use as evidence of alienage and deportability will be consonant with due process.

However, in this case, the issue of whether the respondent's initial motion to suppress presented prima facie evidence of overreaching is now moot because we directed in our prior order that the Service must come forward with its agents' testimony, and the agents' testimony is now of record.[7] We now find, as the Immigration Judge did, that in view of the totality of the evidence of record, including the agents' testimony, the respondent's admissions were not involuntary.

In his brief, the respondent maintains that the alleged admissions contained in the I-213 were the product of "coercion, duress, and improper action on the part of the [arresting] officers [that] took place at the time of [his] arrest and interrogation" (Resp. Br. at 14). The respondent asserts, in the first instance, that the Board should rule that the admissions of an unaccompanied minor respondent under the age of 16 are "inherently unreliable" given the "inherently coercive environment" of a custodial interrogation of a child and that, therefore, such admissions are categorically inadmissible as evidence of alienage and deportability. The respondent also invites us to find, in the alternative, that his admissions are presumptively inadmissible and that the Service did not demonstrate that his admissions were voluntarily given. We decline to make such rulings.

(1) Unaccompanied Minor's Admissions Are Neither Inadmissible Per Se nor Presumed Inadmissible

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7/ To the extent that our prior order in this matter could be read as holding that a presumption of coercion or overreaching by the Service arises whenever an unaccompanied, unrepresented minor respondent's I-213 is at issue, we recede from that holding. Neither this Board nor the federal courts have established a presumption in civil deportation proceedings of coercion or overreaching on the part of Service officers, regardless of whether the respondent who was arrested and interrogated is child or adult or whether he was accompanied by counsel or other responsible adult at the time of questioning. E.g., Espinoza v. INS, supra; Matter of Barcenas, supra; see also Perez-Funez v. District Director, INS, 619 F. Supp. 656, 661 (C.D. Cal. 1985) (finding "unfounded" plaintiffs' allegation that the Service engages in policy of overt coercion of unaccompanied minors); Matter of Holmes, 14 I&N Dec. 647, 648 (BIA 1974) (cautioning that allegations of official misconduct should not be made casually and should be made under oath).

As the Supreme Court explained in Colorado v. Connelly, supra, official coercion is the touchstone of any voluntariness inquiry under the Due Process Clause. Thus, the dictates of the Court in Connelly expressly preclude the respondent's argument that the in-custody admissions of a minor respondent under the age of 16, as a rule, should be per se inadmissible because of the "inherently coercive" nature of custodial interrogation and an unaccompanied minor respondent's youth, immaturity, inexperience, and conceivable inability to understand the nature of immigration proceedings.

In fact, even where evidence of official overreaching has been present, the courts have emphasized that while the age of the declarant is certainly a highly probative factor in the "totality of circumstances" inquiry, it is not necessarily determinative of the voluntariness of admissions. This is the case even in criminal or juvenile delinquency cases where the minor declarant acts without the advice of counsel or another responsible adult.[8] E.g., Fare v. Michael C., supra; Derrick v. Peterson, 924 F.2d 813, 819 (9th Cir. 1990), cert. denied, 502 U.S. 853 (1991); United States v. White Bear, 668 F.2d 409 (8th Cir. 1982) (per curiam); West v. United States, 399 F.2d 467 (5th Cir. 1968), cert. denied, 393 U.S. 1102 (1969). Rather, age is but one among many traditional indicia of voluntariness examined under the "totality of the circumstances" test. Withrow v. Williams, supra; see also Navia-Duran v. INS, supra; Bong Youn Choy v. Barber, supra.

We also find no merit in the respondent's contention that the regulations at 8 C.F.R. § 242.16(b) give rise to an operative legal presumption that the factual admissions of an unrepresented, unaccompanied minor under 16 years of age are involuntary and, therefore, inadmissible. The regulations at 8 C.F.R. § 242.16(b), governing the pleading by a respondent in deportation proceedings, prescribe the following:

> If the respondent admits the factual allegations and admits his deportability under the charges and the [Immigration Judge] is satisfied that no issues of law or fact remain, the [Immigration Judge] may determine that deportability as charged has

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8/ We find inapposite the respondent's assertion that he did not knowingly and intelligently waive his right to counsel when interrogated by Agents Gibson and Chavez. The respondent does have a due process right to counsel of his own choice at no expense to the government at his deportation hearing. Sections 242(b)(2), 292 of the Act, 8 U.S.C. §§ 1252(b)(2), 1362; 8 C.F.R. § 242.10. However, the courts have long held that because deportation proceedings are civil and not criminal in nature, "the rules laid down in Massiah v. United States, 377 U.S. 201 (1964), and Escobedo v. Illinois, 378 U.S. 478 (1964) requiring the presence of counsel during interrogation, and other Sixth Amendment safeguards, are not applicable in such proceedings." Lavoie v. INS, 418 F.2d 732, 734 (9th Cir. 1969), cert. denied, 400 U.S. 854 (1970); see also Bustos-Torres v. INS, supra, at 1056-57. Under the governing regulations, the Service need not advise the respondent of his statutorily defined right to counsel until "the examining officer has determined that formal proceedings . . . will be instituted." 8 C.F.R. § 287.3. While the immaturity and inexperience of most minors under 16 years of age will make it desirable for those in custody to have the advice of counsel or another responsible adult, neither case law nor regulation mandates counsel for minors prior to questioning by Service officers.

> been established by the admissions of the respondent. The [Immigration Judge] shall not accept an admission of deportability from an unrepresented respondent who is incompetent or under age 16 and is not accompanied by a guardian, relative, or friend; nor from an officer of an institution in which a respondent is an inmate or patient. When, pursuant to this paragraph, the [Immigration Judge] may not accept an admission of deportability, he shall direct a hearing on the issues.

(Emphasis added.). The regulation reflects the presumption that minor respondents lack sufficient maturity and experience to meaningfully comprehend the often highly complex legal issue of whether he or she is deportable under the immigration laws of this country.

This regulatory provision, however, does not render inadmissible, as evidence of alienage and deportability, the factual admissions of an unrepresented, unaccompanied minor respondent under 16 years of age, whether made to an Immigration Judge at the deportation hearing or a Service officer in a pre-hearing interrogation. Nor does it create an operative presumption that such admissions are not to be admitted into evidence for consideration by the Immigration Judge. Rather, on its face, the regulation precludes an Immigration Judge from accepting an admission to a charge of deportability from such a minor. Id. Whether the factual admissions of an unaccompanied minor respondent in a given case are sufficiently reliable by themselves to form the basis for a finding of deportability is a separate issue addressed later in this decision.

(2) Evidence of Coercion, Intimidation, Duress, or Other Overreaching by Immigration and Naturalization Service Agents

In the alternative, the respondent heavily relies, as evidence of the involuntariness of his admissions, upon his collective personal "susceptibilities," e.g. his age, maturity and educational levels, his psychological profile regarding susceptibility to influence by authority figures, and his alleged inability to fully appreciate the nature of these proceedings and the documents he was asked to sign. However, such factors are not controlling because the respondent has not first adduced evidence of overreaching by Agents Gibson and Chavez. See, e.g., Colorado v. Connelly, supra (declarant in psychotic mental state at time of confession); United States v. Barbour, 70 F.3d 580 (11th Cir. 1995) (declarant suffered from severe depression for which he was taking medication); United States v. Huynh, 60 F.3d 1386 (9th Cir. 1995) (per curiam) (declarant offered psychiatric testimony that her "childhood experiences in Indochina impressed upon her a survival instinct to 'do whatever she was instructed to do' by persons in authority"); Derrick v. Peterson, supra (declarant was 16 years old and of low intellectual ability); United States v. Raymer, supra (declarant was uneducated, on heavy prescription drugs, in pain, and confined in prison hospital); United States v. Diggs, 801 F. Supp. 441 (D.Kan. 1992) (declarant under influence of cocaine).

The record is devoid of evidence indicating that Agents Gibson and Chavez engaged in any form of coercion, intimidation, duress, trickery, willful misrepresentation, or improper inducement to elicit his admissions. We also find no evidence suggesting that the officers intentionally exploited a known weakness of the respondent. See United States v. Guerro, 983 F.2d 1001 (10th Cir. 1993) (holding

that police did not exploit defendant's youth, inexperience, and minimal ability to understand English); United States v. Bradshaw, 935 F.2d 295 (D.C. Cir. 1991) (finding no evidence that police took advantage of defendant's mental illness); United States v. Rohrbach, 813 F.2d 142 (8th Cir. 1987) (concluding that police did not take advantage of defendant's minimal formal education, alcohol and drug abuse, and history of suicide attempts); United States v. Diggs, supra (observing that police did not exploit fact that confessant was under influence of cocaine at time of interrogation); State v. Kekona, 886 P.2d 740, 743 (Haw. 1994) (finding no evidence impermissible tactics were employed to take advantage of adult defendant's learning disability and 4th-grade education); State v. Gamines, 799 P.2d 785 (Ariz. 1990) (finding no evidence of police exploitation of 17-year-old defendant's exceptionally low I.Q. and paranoid schizophrenia).

Contrary to the suggestion of the respondent, we find no indication of overreaching in the uniformed agents' gestures, wearing of service revolvers, arrest and interrogation tactics, or manner of transporting the respondent to the station house. See, e.g., United States v. Rojas-Martinez, supra, at 418 (holding that "[e]xpressions of sympathy by an officer are not coercive" and that "[a]n officer does not overreach by conducting an interview in full uniform, including a service revolver, unless he threatens the defendant"); State v. Woods, 345 N.W.2d 457 (Wisc. 1984) (rejecting contention that police exploited juvenile's personal vulnerabilities through "pretended friendly gestures" and "fatherly approach"). As the Immigration Judge noted in his decision, the psychological evaluation of the respondent opines that the respondent "expressed very positive feelings towards immigration personnel, who provided him with food, companionship, guidance, approval, and emotional warmth" (Exh. 7).

The agents, responding to a call from a resident of Laredo who had been providing food and shelter for the respondent, apprehended the respondent around noon in a peaceful manner. The agents did not handcuff the respondent during the 10-minute ride to the station house or during the course of the interrogation. The respondent was questioned in an open, well-lit room. No other uniformed officers or apprehended aliens were in the room at the time. The interrogation, conducted in the respondent's native language of Spanish, lasted only approximately 30 minutes out of 2-3 hours the respondent was in the station house office area. During the interrogation the agents offered the respondent a soda and invited him to eat the fruit provided him by the informant. According to Agent Chavez, the respondent did not appear to be in need of immediate medical attention for his eye condition. According to the agents' testimony, the respondent was fully cooperative, calm, unemotional, and responsive throughout the proceedings. The respondent volunteered answers to each of the basic, open-ended factual questions posed.

To the extent that the respondent is arguing that the agents' behavior was acceptable but for the respondent's youth, immaturity, inexperience, and allegedly heightened susceptibility to the influence of authority figures, this argument is foreclosed by Colorado v. Connelly, supra. Accordingly, we

hold that the respondent's admissions were not "involuntary" within the meaning of the Due Process Clause, and the Service's use of the I-213 is fundamentally fair.[9]

C. Sufficiency of the Evidence

The fact that an admission or statement may not be "involuntary" for due process purposes does not end our inquiry, however. Evidence may be admissible but insufficient to support a finding of alienage and deportability as charged. We will first examine the nature of the Service's burden of proof in this regard.

1. Sufficiency of I-213 Generally

The Service has the ultimate burden of proving the respondent's deportability by "clear, unequivocal, and convincing evidence." Woodby v. INS, supra. However, in cases such as this in which the Service charges the respondent with deportability under section 241(a)(1)(B) of the Act as an alien who entered the United States without inspection, the Service need only establish alienage by the requisite quantum of proof. Bustos-Torres v. INS, supra, at 1057-58; Matter of Guevara, supra, at 242-44. Once the Service has adduced clear, unequivocal, and convincing evidence of the respondent's alienage, section 291 of the Act, 8 U.S.C. § 1361, imposes a statutory presumption of unlawful entry which shifts the burden of proof to the respondent to show the time, place, and manner of his entry. Murphy v. INS, 54 F.3d 605, 608-10 (9th Cir. 1995); Bustos-Torres v. INS, supra; Matter of Guevara, supra.

9/ We reject the respondent's contention that the admissions alleged in the I-213 should be deemed involuntary because he did not knowingly and intelligently waive his Fifth Amendment privilege against self-incrimination. This Board has long recognized that an alien may invoke his privilege against self-incrimination in deportation proceedings and refuse to answer any question he reasonably believes "may reasonably have a tendency to incriminate [him] or furnish proof of a link in a chain of evidence necessary to convict him of a crime." Matter of R-, 4 I&N Dec. 720, 721 (BIA 1952); see also Chavez-Raya v. INS, 519 F.2d 397 (7th Cir. 1975); Matter of Carrillo, 17 I&N Dec. 30, 32-33 (BIA 1979). It is well-settled, however, that in most contexts the privilege is not self-executing and, thus, must be claimed when self-incrimination is threatened. Minnesota v. Murphy, 465 U.S. 420, 427-29 (1984).

In the ordinary case, if a person questioned by an officer of the government makes damaging disclosures instead of asserting his privilege against self-incrimination, he forfeits his right to object to subsequent use of his admissions against him, regardless of whether the person's failure to claim the privilege was founded upon a knowing and intelligent decision to waive his constitutional right not to answer potentially incriminating questions. Minnesota v. Murphy, supra; Garner v. United States, 424 U.S. 648, 654 (1976). Inasmuch as the federal courts have uniformly held that the extraordinary safeguards of Miranda v. Arizona, 384 U.S. 436 (1966), are not applicable in civil deportation proceedings, INS v. Lopez-Mendoza, supra note 4, at 1038-39; Bustos-Torres v. INS, supra; Matter of Sandoval, 17 I&N Dec. 70, 76-77 (BIA 1979), the general rule applies here, and the respondent's admissions were not obtained in violation of his 5th Amenment privilege.

If found admissible, a properly authenticated I-213 evidencing the respondent's foreign birth, without more, will be sufficient in most cases to meet the Service's initial burden and invoke the statutory presumption of unlawful presence in the United States. See Espinoza v. INS, supra; Bustos-Torres v. INS, supra; Matter of Guevara, supra. The alien may challenge the accuracy, reliability, and weight of adverse evidence, including his own admissions. See, e.g., Espinoza v. INS, supra. Unless a credible challenge to the reliability and accuracy of the I-213 is made, the Service generally is not obliged to make available the form's preparer or the examining agent for cross-examination. Olabanji v. INS, 973 F.2d 1232, 1234 n.1 (5th Cir. 1992); Bustos-Torres v. INS, supra.

2. The Scope of 8 C.F.R. § 242.16(b) and the Sufficiency of the I-213 in Cases of Unaccompanied, Minor Aliens Under 16 Years of Age

At issue in this matter, however, is the uniquely intricate question of the sufficiency of out-of-court admissions of an unrepresented, unaccompanied 13-year-old minor as evidence of his alienage and deportability. As we observed in our August 17, 1993, order, the regulations require that special treatment be accorded minors under age 16 in deportation proceedings in order to safeguard their rights. Arguably, the most significant of these specially tailored regulations is 8 C.F.R. § 242.16(b). This regulation, addressed previously in this decision, bars an Immigration Judge from accepting an admission to a charge of deportability from an unaccompanied and unrepresented minor under the age of 16 years based on an apparent assumption that such a minor ordinarily will be incapable of ascertaining whether a particular legal charge applies to him.

The provisions of 8 C.F.R. § 242.16(b), however, do not preclude an Immigration Judge from basing a finding of deportability upon factual admissions of an unaccompanied minor, whether made during custodial interrogation, in the course of the hearing, or both. Thus, an officer of the Service may in a pre-hearing custodial interrogation ask an unaccompanied, unrepresented minor respondent basic factual questions, regardless of whether the voluntary responses thereto individually or cumulatively may later establish the respondent's deportability by clear, unequivocal, and convincing evidence, depending upon the evidentiary weight accorded them by the Immigration Judge.

Yet, we are mindful that unique issues surface when an unrepresented and unaccompanied minor under age 16 is subject to questioning by the Service, regardless of whether the minor's admissions were recorded on an authenticated I-213. In particular, a significant issue arises with respect to the reliability and accuracy of such admissions where they are introduced without any independent evidence regarding the circumstances and conditions of the minor's arrest and interrogation, the nature and content of the questions asked of the minor, and the competency of the minor to provide trustworthy responses.

Particularly in view of the provisions of 8 C.F.R. § 242.16(b), we find that an I-213 form containing out-of-court admissions and statements of an unrepresented and unaccompanied minor respondent under the age of 16 ordinarily will not be sufficient to establish the alienage or deportability of the minor respondent by clear, unequivocal, and convincing evidence, absent additional evidence demonstrating the reliability and accuracy of the information contained in the

I-213 (e.g., evidence that the questions posed were non-leading, non-abusive, and simple; that the minor was sufficiently competent to understand the nature of the questions asked to provide truthful, unequivocal, unexaggerated, and accurate responses; and that the responses were given in the exercise of the minor's own volition and not at the suggestion of the agents or a third party).[10]

With respect to evidence of the respondent's "competency," we do not refer to a minor's ability to fully appreciate the nature of deportation proceedings and understand the consequences of his answers to the agents' inquiries. Rather, the evidence should demonstrate that the minor alien had the mental capacity, volition, and wherewithal to comprehend the content of the questions, such that he could relate definite and trustworthy responses.

The respondent may present evidence to impeach the reliability and accuracy of the I-213, any supporting evidence, or the credibility of witnesses. The Immigration Judge must ultimately determine whether the evidence proffered by the Service is of sufficient trustworthiness and weight that it clearly, unequivocally, and convincingly establishes the respondent's alienage and deportability.

3. Whether the I-213 and Corroborating Testimony Constitute Clear, Unequivocal, and Convincing Evidence of the Respondent's Deportability

Here, the Immigration Judge predicated his deportability determination on the out-of-court admissions of the respondent as recorded on an authenticated I-213 and the credible, corroborating testimony of Agents Gibson and Chavez. We are asked to review the Immigration Judge's assessment of the sufficiency of this evidence. Upon review, we agree with the Immigration Judge's conclusion that the credible testimony of Agents Gibson and Chavez adequately established the reliability and accuracy of the information contained in the I-213, including the substance of the respondent's factual admissions.

According to Agents Gibson and Chavez's testimony, the respondent, although clearly young, did not appear confused or frightened. The respondent lucidly provided answers to the agents' simple, straightforward, and open-ended factual inquiries regarding his age, date and place of birth, manner of entry into the United States, and family relations in the United States. The respondent was in good physical condition. The respondent has not alleged that he suffers from any mental illnesses or subnormal intelligence. While the respondent contends that he is a submissive, dependent child who is exceptionally susceptible to the suggestions of authority figures, there is no indication in the record that the hearsay statements alleged in the I-213 are not his own or that the agents suggested his responses. The I-213 reflects that the respondent clearly and unequivocally stated that he was born in Honduras and that he entered the United States from Mexico without inspection. We, therefore, conclude that the I-213 and the agents' testimony collectively constitute clear, unequivocal, and convincing evidence of the respondent's deportability.

10/ On the facts before us, we need not address whether such information may be set forth adequately on the I-213 form itself, as such was not the case here.

VI. REGULATORY VIOLATIONS AND PREJUDICE

Lastly, the respondent contends that Agents Gibson and Chavez violated two regulations he avers were promulgated especially to protect the interests of unaccompanied minor aliens: 8 C.F.R. §§ 287.3 and 242.24(g). According to the respondent, these violations resulted in material prejudice to him and denied him due process under the Fifth Amendment. He, therefore, seeks termination of these proceedings on the basis that these regulatory violations effectively invalidated the fundamental fairness of the proceedings. We are unpersuaded by this contention as well.

We agree with the respondent that the Service must comply with its own regulations where such regulations "serve a purpose of benefit to the alien." See, e.g., Matter of Garcia-Flores, supra, at 328. However, the Service's failure to observe its own regulation does not necessarily render an administrative immigration proceeding invalid or unlawful. Matter of Hernandez, Interim Decision 3265, at 5 (BIA 1996). Rather, in order to prove that the proceedings should be invalidated for violation of regulations, an alien must demonstrate that the regulatory violation resulted in "substantial prejudice." Molina v. Sewell, 983 F.2d 676, 678 (5th Cir. 1993); see also United States ex. rel. Accardi v. Schaughnessy, 347 U.S. 260 (1954); Matter of Hernandez, supra. But see Waldron v. INS, 17 F.3d 511, 517-18 (2d Cir. 1993) (holding that showing of prejudice is not necessary where the violated regulation concerns a "fundamental right[] derived from the Constitution or federal statutes"). "To show prejudice, the alien must establish more than that he would have availed himself of the procedural protections; he must produce 'concrete evidence' that the violation had the potential for affecting the outcome of the proceeding." Hernandez-Luis v. INS, 869 F.2d 496, 498 (9th Cir. 1989).

A. Alleged Violation of 8 C.F.R. § 287.3

The regulations at 8 C.F.R. § 287.3 preclude the examination of an apprehended alien by the arresting officer unless "no other qualified officer is readily available and the taking of the alien before another officer would entail unnecessary delay." The respondent argues that Agents Gibson and Chavez, the arresting and examining officers in this case, did not adequately establish that no other qualified officer was available on June 20, 1992, to interview the respondent or that the taking of the respondent before another qualified officer would entail "unnecessary delay." We disagree.

First, we find no material violation of this regulation. Both Agents Gibson and Chavez credibly testified at the hearing that no other qualified officer was available at the station house to examine the respondent that day, a Saturday. Agent Chavez stated that the only person at the station house that day was their supervisor, who was performing other professional duties at the time of the respondent's interrogation such as making arrangements for the respondent's custodial placement. Accordingly, Agent Chavez conducted the examination of the respondent. We find reasonable the agents' judgment that their supervisor was not "readily available" to conduct the examination.

The respondent suggests that the agents did not explain why they could not have called another qualified officer in from the field to examine the respondent. But even if such other qualified officer

were in the field at the time, the regulation emphasizes that the other officer must be "readily" available.[11]

Second, although the relevant portion of 8 C.F.R. § 287.3 at issue evidently serves a purpose of benefit to the alien, especially an unaccompanied minor, the respondent has failed to demonstrate how the agents' putative violation of 8 C.F.R. § 287.3 resulted in "substantial prejudice" to him. We find no "concrete evidence" in the record that the alleged violation "had the potential for affecting the outcome of the proceeding." Hernandez-Luis v. INS, supra. Nor has the respondent provided us with such evidence.

B. Alleged Violation of 8 C.F.R. § 242.24(g)

The respondent further alleges that Agents Gibson and Chavez failed to comply with 8 C.F.R. § 242.24(g), a regulation specifically promulgated for the benefit of juveniles apprehended by the Service. The relevant language of 8 C.F.R. § 242.24(g) provides that each juvenile apprehended, other than those permanently residing in either Mexico or Canada, "shall be provided access to a telephone and must in fact communicate with either a parent, adult relative, friend, or with an organization found on the free legal services list prior to presentation of the voluntary departure form." The regulation ensures that an unaccompanied juvenile contact a responsible adult before he is presented with the voluntary departure form (Form I-770), which asks the respondent to elect either to: (1) request a hearing before an Immigration Judge; or (2) admit that he is in the United States illegally, relinquish his right to hearing, and return to his home country. See Perez-Funez v. District Director, INS, 619 F. Supp. 656 (C.D. Cal. 1985).

The Form I-770, signed by the respondent, reflects that the agents indeed asked the respondent whether he wished to make a telephone call and offered him assistance in the use of the telephone (Exh. 5). The respondent, however, declined (Id.). We find no reason to question the agents' testimony that the respondent was timely provided a list of free legal service organizations in the vicinity of the Immigration Court, including the organizations' respective telephone numbers. The respondent elected not to place a call and requested a hearing before an Immigration Judge. Thus, while the respondent did not "in fact" contact one of the persons specified in 8 C.F.R. § 242.24(g) before signing the I-770, he has not demonstrated how he suffered "substantial prejudice" as a result, especially as the I-770 has not been considered as evidence of the respondent's deportability.

11/ We accept for purposes of this discussion that Agent Chavez was an "arresting officer" in that he was present when the respondent was apprehended and drove the Border Patrol van to the station house. It was Agent Gibson, however, and not Agent Chavez, who personally apprehended the respondent. Agent Chavez then conducted the interrogation at the station house.

VII. CONCLUSION

This case has presented several important issues concerning the due process rights of unaccompanied minors in deportation proceedings. We conclude that those procedures designed for and necessary to the intrinsic fairness of these deportation proceedings were observed here.

The OSC was properly served upon the respondent in accordance with the special regulatory procedures designed for service of process upon minor aliens under the age of 14. The out-of-court, custodial admissions of the respondent contained in the authenticated I-213 form were voluntarily given and admissible as evidence of his alienage and deportability. Having presented the I-213 and the credible, corroborating testimony of the arresting and examining agents, the Service has met its burden of demonstrating the respondent's alienage and deportability by clear, unequivocal, and convincing evidence. Finally, the Service did not commit material violations of its own regulations that would warrant termination of these proceedings for want of due process. Accordingly, the following orders will be entered.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and in accordance with our decision in Matter of Chouliaris, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; and in the event of failure to so depart, the respondent shall be deported as provided in the Immigration Judge's order.

Paul W. Schmidt

FOR THE BOARD